

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Qwest Communications International, )  
Inc. Consolidated Application for ) WC Docket No. 02-314  
Authority to Provide In-Region, InterLATA )  
Services in Colorado, Idaho, Iowa, Montana, )  
Nebraska, North Dakota, Utah, )  
Washington, and Wyoming )

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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Nebraska, North Dakota, Utah,	)	
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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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**Introduction and Summary**

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996<sup>1</sup> (“the 1996 Act”), submits this Evaluation of the Joint Application filed by Qwest Communications International, Inc. on September 30, 2002, to provide in-region, interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming. Qwest’s Joint Application to the Federal Communications Commission (“FCC” or “Commission”) is its second for long distance authority in all of these states. It follows Qwest’s withdrawal of two Joint Applications for long distance authority in Colorado, Idaho, Iowa, Nebraska, and North Dakota, and in Montana, Utah, Washington, and Wyoming, respectively, due to its inability to respond to questions regarding its compliance with the requirements of Section 272 of the 1996 Act.<sup>2</sup>

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<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

<sup>2</sup> Qwest Applications Withdrawal *Ex Parte* at 1 (noting FCC staff “has raised questions regarding the issue of whether Qwest Communications Corporation, the designated Section 272 affiliate, can be said to meet the requirements of Section 272 given pending restatement of its financial statements for past periods”); *see also*

The Department submitted its Evaluation of Qwest's first multistate application on July 23, 2002.<sup>3</sup> Concerns related to Qwest's manual processing of CLEC orders and its provision of electronically auditable wholesale bills precluded the Department from supporting that application as filed.<sup>4</sup> Nonetheless, the Department acknowledged that Qwest had submitted substantial additional evidence which, if sufficiently meaningful and reliable, would justify the grant of long distance authority in those five states.<sup>5</sup> The Department also urged the Commission to carefully consider the adequacy of Qwest's benchmark calculations in evaluating whether the prices in certain states fell within the range that a reasonable application of TELRIC would produce.<sup>6</sup>

The Department's Evaluation of Qwest's second multistate application, filed on August 21, 2002, reiterated that the application as filed did not sufficiently demonstrate the adequacy of Qwest's manual order processing or the electronic auditability of its wholesale bills

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FCC Chairman Powell Qwest Withdrawal Statement at 1 ("[Q]uestions remain regarding whether Qwest has complied with the safeguards set forth by Congress in section 272 of the Act."); *cf. FCC Texas Order* ¶ 400 (noting SBC submitted additional, unchallenged evidence to demonstrate that its Section 272 affiliate maintained books, records and accounts in accordance with Generally Accepted Accounting Principles ("GAAP")).

<sup>3</sup> This Evaluation incorporates by reference the DOJ Qwest Multistate I Evaluation and DOJ Qwest Multistate II Evaluation.

<sup>4</sup> DOJ Qwest Multistate I Evaluation at 14-25, 33.

<sup>5</sup> *Id.* at 2. The Department's Evaluation also addressed the possible impact on the Department's Section 271 analysis of Qwest's failure to have publicly filed certain interconnection agreements for state approval. *Id.* at 2-5. Although the Department found that the allegations were serious, it did not find that they necessarily implicated its analysis of whether the local exchange markets *are* at the time of application fully and irreversibly open to competition, or that resolution and remedy of the possible Section 251 or 252 violations were required to be addressed in the pending Section 271 docket. Since then, the Commission has ruled on Qwest's motion for declaratory judgment, describing Qwest's view of the Act's filing requirement as overly narrow and stating that any agreement that creates an "ongoing obligation" related to the Act's requirements should be filed pursuant to Section 252. *FCC Qwest Declaratory Judgment* ¶ 8. The Commission specifically noted that its ruling did not preclude continuing or future state enforcement action related to these issues. *Id.* ¶ 10. Pursuant to a May 2002 order of the Iowa Utilities Board, as well as its own commitment to the FCC, by August Qwest had filed for approval in each of the applicant states agreements with CLECs which include any "ongoing obligations." Qwest Unfiled Agreements Commitment *Ex Parte*; Qwest Br. Tab 13 at 1-3.

<sup>6</sup> DOJ Qwest Multistate I Evaluation at 31-32.

but that additional evidence could support approval of both multistate applications.<sup>7</sup> The Department also expressed concern regarding Qwest's testing of line-sharing orders and again urged the Commission to be sure that the rates supporting the applications fell within an appropriate range.<sup>8</sup> Qwest continued to file *ex parte* information on these issues almost until the applications were withdrawn, and its re-filed application also includes updated information pertaining to these issues in all nine states.<sup>9</sup>

Qwest's re-filed application focuses on the recent actions it has taken to comply with Section 272 and relies primarily on evidence submitted during its initial multistate applications to prove compliance with the market-opening requirements of Section 271.<sup>10</sup> Although commenters oppose Qwest's re-filed application on various grounds, all but one of the nine state commissions have submitted comments supporting approval of Qwest's Section 271 applications for their respective states.<sup>11</sup>

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.<sup>12</sup> The levels of competitive entry have not changed significantly since the Department found that Qwest had generally succeeded in

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<sup>7</sup> DOJ Qwest Multistate II Evaluation at 10-17.

<sup>8</sup> *Id.* at 17-18, 19-21.

<sup>9</sup> Qwest has submitted an additional month of performance data and has updated the information regarding competitive entry into the local market in the relevant states. Qwest Br. Attach. 5 App. D (Aug. 2002 Performance Results); Qwest Teitzel Decl. (state of local entry).

<sup>10</sup> Qwest Br. at 4.

<sup>11</sup> See Colorado PUC Comments at 1; Idaho PUC Comments at 3; Iowa UB Comments at 2; Nebraska PSC Comments at 2; North Dakota PSC Comments at 1; Utah PSC Comments at 1; Washington UTC Comments at 2; Wyoming PSC Comments at 2, 6. *But see* Montana PSC Comments at 1-3 (recommending FCC deny application based on Qwest's failure to fulfill two state-level conditions regarding reverse line-splitting and mitigation of price squeeze). The Department has previously addressed the conditions the Montana PSC seeks to impose. DOJ Qwest Multistate II Evaluation at 5 n.17.

<sup>12</sup> See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

opening its local markets in these nine states.<sup>13</sup> The current record of entry therefore does not raise issues beyond those addressed in the Department's prior Qwest Multistate evaluations. In addition, the Department continues to defer to the Commission's ultimate determination regarding whether the prices supporting Qwest's applications are appropriately cost-based.<sup>14</sup> Moreover, and as discussed below, the Department finds that the record has improved with respect to the other issues about which it previously had expressed reservations: manual order processing, the provision of electronically auditable wholesale bills, and the testing of line-sharing orders.

Beyond these issues, however, the Department finds troubling an affidavit filed by AT&T in which a former Qwest employee declares that Qwest personnel "diminish[ed] the visibility" of certain information to Commission staff who were visiting the Qwest CLEC Coordination Center.<sup>15</sup> The former employee states that a Mechanized Loop Test ("MLT") was run routinely as part of the provisioning process for hot-cut loops but that this fact was hidden from regulators.<sup>16</sup> At that time, CLECs were requesting pre-order access to Qwest's MLT capabilities in order to pre-qualify loops for DSL service and also were expressing concerns that Qwest had collected MLT information that it had not loaded into its Raw Loop Data Tool, to which CLECs submit pre-qualification queries.<sup>17</sup> The affidavit suggests that Qwest, in its

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<sup>13</sup> Compare Qwest Teitzel Decl. at 10-11, 19-20 with DOJ Qwest Multistate I Evaluation at 10-14 and DOJ Qwest Multistate II Evaluation at 7-10.

<sup>14</sup> See DOJ Rhode Island Evaluation at 6; DOJ Missouri I Evaluation at 1-2; DOJ Kansas/Oklahoma Evaluation at 11. Qwest has continued to modify its UNE rates. Qwest Pricing *Ex Parte*; Qwest Pricing Correction *Ex Parte*. These modifications may render moot the Department's previously expressed concerns. See DOJ Arkansas/Missouri Evaluation at 7.

<sup>15</sup> AT&T Stemple Decl. ¶ 12 & Attach. 1 at 1 (e-mail from Qwest manager to Qwest CLEC Coordination Center ("QCCC") employees).

<sup>16</sup> *Id.* ¶¶ 5-7 (Mechanized Loop Test ("MLT") routinely performed), 8-10 (MLT references hidden from regulators).

<sup>17</sup> See Covad Qwest Multistate I Comments at 22-25 (requesting pre-order MLT access); 16-22 (requesting an audit of Qwest's Raw Loop Data Tool ("RLDT") in the belief that not all MLT data were loaded into the tool).

eagerness to protect its position, sought to limit the information available to regulatory decision-makers.<sup>18</sup> Qwest has disputed this account and maintains that it is irrelevant to its Section 271 application, but admits that references to MLTs were removed from chart-boards in advance of visits by regulators to the QCCC.<sup>19</sup> Although the substantive effect of the alleged action remains unclear,<sup>20</sup> the procedural implications are disturbing.<sup>21</sup> The Department recommends that the Commission assure itself that it has full and accurate information with regard to this allegation before proceeding to address the remainder of the issues raised by Qwest's re-filed application.<sup>22</sup>

## **I. Manual Handling of Orders**

In its Evaluations of Qwest's prior multistate applications, the Department expressed concerns about the accuracy of its manual processing of CLEC orders.<sup>23</sup> In response, Qwest produced specially generated performance measurement data as well as new data pursuant to

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<sup>18</sup> AT&T Stemple Decl. Attach. 1 at 1 (e-mail stating "we don't want to bring attention to [MLT] in front of the FCC as they may have a tendency to respond to CLEC requests in a manner which may be unfavorable to us").

<sup>19</sup> Qwest Response to MLT Allegations *Ex Parte* at 1-5.

<sup>20</sup> AT&T's allegations that Qwest's hot-cut provisioning process included running the MLT with the results stored in an unnamed Qwest system, AT&T Stemple Decl. ¶¶ 5-7, do not directly contradict Qwest's previous assertions regarding the MLT information that initially populated and is used to refresh its RLDT, *see* Qwest Multistate II Notarianni/Doherty Reply Decl. ¶¶ 46-52 (responding to Covad's assertion that Qwest had "hoarded" MLT information and explaining how Qwest refreshes its RLDT on a monthly basis using updated sample MLT information); *see also* Covad Qwest Multistate I Comments at 19 (describing bulk MLTs run by Qwest to initially populate RLDT with loop-length information and asserting Qwest maintained the remaining MLT information in separate database for use by its retail sales representatives).

<sup>21</sup> *See FCC Forfeiture Notice and Order* ¶ 42 ("The duty of absolute truth and candor is a fundamental requirement for those appearing before the Commission.").

<sup>22</sup> Eschelon raises two issues that the Department commends to the Commission's careful attention. First, Eschelon complains that customer-affecting troubles, including outages on UNE-platform lines, which occur at or immediately after conversion are not reflected in Qwest's regularly reported performance data. Eschelon Comments at 8-20, 27-30. Second, Eschelon reiterates its earlier complaints regarding missing usage records and now attaches a third-party audit to substantiate its claims. *Id.* at 47-53. WorldCom alleges, without quantification, that Qwest returns completion notices for UNE-platform orders regardless of whether the order has actually been provisioned. WorldCom Lichtenberg Decl. ¶ 33. "SOCs are key notifiers and must be timely and accurate." DOJ Qwest Multistate I Evaluation at 18 n.80. The extremely abbreviated briefing schedule established by the Commission has led the Department to note these issues, but not resolve them. *See* DOJ New Jersey II Evaluation at 9 n.40.

<sup>23</sup> DOJ Qwest Multistate I Evaluation at 16-22; DOJ Qwest Multistate II Evaluation at 10-14.

proposed performance measures to demonstrate that its manual processing of CLEC orders was acceptably accurate.<sup>24</sup> In this re-filed application, Qwest has produced an additional month's data on the accuracy of its manual service order processing as well as its overall provisioning of features.<sup>25</sup> Commenters continue to assert that Qwest's manual processing is poor, that its data inaccurately depict its performance due to flaws in measurement techniques, and that the proposed metric fails to reflect several key indicia.<sup>26</sup>

Qwest's data suggest that its current service order accuracy performance is consistent with that of other BOCs whose Section 271 applications have been approved.<sup>27</sup> However, Qwest's fulfillment of its commitments to maintain as well as improve the accuracy of its service order processing deserves close monitoring, and its continued collection and reporting of data on this process will be critical to ensuring the adequacy of its post-entry performance.<sup>28</sup>

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<sup>24</sup> Qwest Multistate I DOJ Issues *Ex Parte* Tab 5 at 16-17 (sample data suggesting a 97 percent manual accuracy rate); Qwest Response to FCC OSS Concerns *Ex Parte* at 5 (new PID PO-20 data showing approximately 90 percent manual accuracy); Qwest Service Order Accuracy Comparison *Ex Parte* at 1-2 (showing August 17 system enhancement to automate certain edits raised handling accuracy to more than 95 percent for resale and UNE-platform); Qwest LSR/SO Mismatches *Ex Parte* at 3 (specially generated data showing accuracy rate of 95 to 98 percent on manually processed features orders).

<sup>25</sup> Qwest Br. Tab 1 at 2 (PID PO-20 data for August showing nearly 93 percent manual accuracy for resale and UNE-platform), 5 (recalculating the PID PO-20 data as if the mid-month enhancement had been in place for the entire month, resulting in more than 93 percent accuracy for resale and UNE-platform), 7-9 (showing approximately 99 percent overall processing accuracy based on Call Center Data).

<sup>26</sup> See, e.g., AT&T Finnegan/Connolly/Wilson Decl. ¶¶ 66-70; Eschelon Comments at 34-37.

<sup>27</sup> *FCC New York Order* ¶¶ 173-74 & n.548 (restated data showed Bell Atlantic [Verizon] achieved 87 percent service order accuracy); *FCC Georgia/Louisiana Order* ¶ 159 n.577 (data showed BellSouth achieved 90 to 95 percent service order accuracy).

<sup>28</sup> DOJ Qwest Multistate II Evaluation at 14 n.65. As long as the relevant data are available, the Department takes no position on whether they should be included in a revised PID PO-20, a revised PID OP-5++ (also referred to as "Service Order Accuracy -- Call Center Detail") or some other PID. *Id.*; Qwest Br. Tab 1 at 1-4 (explaining development and definition of PO-20), 7-9 (explaining development and definition of OP-5++). See also *supra* notes 22 and 26.

## II. Electronically Auditable Billing

In its Evaluations of Qwest's prior multistate applications, the Department expressed concerns about the electronic auditability of its wholesale bills.<sup>29</sup> Qwest did not adequately address this matter in its initial applications and had to submit substantial additional evidence in *ex parte* and reply filings.<sup>30</sup> The Department determined that this additional evidence demonstrated that Qwest provided electronically auditable billing for CLECs with moderate billing volumes, but that it did not provide sufficient proof that its systems were adequate for CLECs with large volumes.<sup>31</sup>

In its re-filed application, Qwest has provided additional detail regarding the electronic auditability of its ASCII- and EDI-formatted CRIS bills, including those for CLECs with larger billing volumes, and also has updated the status of its Bill Output Specifications-Bill Data Type ("BOS-BDT") implementation.<sup>32</sup> It appears that only one CLEC operating in Qwest's region demands full implementation of BOS-BDT billing in order to electronically audit its wholesale bills.<sup>33</sup> Qwest's implementation of BOS-BDT has improved each month<sup>34</sup> but remains sufficiently imperfect that Qwest will not permit CLECs to designate the BOS-BDT bill as the

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<sup>29</sup> DOJ Qwest Multistate I Evaluation at 23-25; DOJ Qwest Multistate II Evaluation at 14-17.

<sup>30</sup> *Id.*

<sup>31</sup> DOJ Qwest Multistate II Evaluation at 16.

<sup>32</sup> Qwest Br. Tab 5 at 1-14 (suggesting Qwest's CRIS-generated bills, in any format, can provide much of the detail AT&T claims is provided by other BOCs, and explaining how Qwest and CLECs can jointly restructure electronic bill format in order to overcome apparent line limitation of certain commercial software); *see also* Qwest BOS-BDT I *Ex Parte* at 1-6; Qwest BOS-BDT II *Ex Parte* at 1-4.

<sup>33</sup> AT&T Finnegan/Connolly/Wilson Decl. ¶¶ 76, 87; *see also* Qwest Br. Tab 5 at 12 (noting WorldCom's exploration of receiving bills in EDI format), 13 (noting interest of two unnamed CLECs now receiving ASCII bills in receiving BOS-BDT formatted bills).

<sup>34</sup> Qwest BOS-BDT I *Ex Parte* at 1-6 (nine problems identified with July BOS-BDT bill were corrected before August bills were sent; four problems identified on July or August bills are being corrected); Qwest Br. Tab 5 at 13-14 (reiterating that the four problems previously identified are being addressed and noting another); Qwest BOS-BDT II *Ex Parte* at 1-4 (providing updates on five BOS-BDT problems and planned fixes).

bill of record.<sup>35</sup> The Department expects Qwest to fully support the continued development of its BOS-BDT wholesale billing system so that CLECs can receive their wholesale bills in a format consistent with that offered by other BOCs and compatible with the CLECs' systems. However, it appears that CLECs' ability to audit their bills electronically is sufficient to support a positive assessment of Qwest's wholesale billing capabilities.<sup>36</sup>

### III. Testing for Line-Sharing Orders

The Department previously expressed concern about Qwest's failure to implement the same line-sharing router testing for wholesale customers as for retail customers.<sup>37</sup> Qwest's re-filed application notes its agreement to develop and implement a router-testing option as part of its line-shared loop provisioning process.<sup>38</sup> Covad's comments voice the hope that Qwest will commit to conduct by the end of the first quarter of 2003 router testing in central offices ("COs") where it already does such testing for its retail customers, at no additional charge to CLECs, and to implement such testing in additional COs for the benefit of CLECs as it does so for retail customers.<sup>39</sup> Qwest's accommodation of Covad's needs would be responsive to the Department's concern that CLECs have nondiscriminatory access to router testing.

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<sup>35</sup> AT&T Finnegan/Connolly/Wilson Decl. ¶ 105.

<sup>36</sup> *Cf. FCC New York Order* ¶ 215 (observing that Bell Atlantic [Verizon] was in the process of developing an application-to-application interface for local service maintenance and repair that "would afford carriers a more complete opportunity to compete[, although] the lack of integration does not necessarily constitute discriminatory access, provided that the BOC otherwise demonstrates that it provides equivalent access to its maintenance and repair functions.").

<sup>37</sup> DOJ Qwest Multistate II Evaluation at 17-18. Covad had complained that the line-sharing verification test previously agreed to as part of the provisioning of line-shared loops was proving inadequate in actual commercial experience and therefore requested that Qwest perform router testing for Covad as it does for retail customers. *Id.* The record contained no justification for Qwest's failure to follow the same provisioning process for wholesale and retail customers. *Id.*

<sup>38</sup> Qwest Br. Tab 9 at 1.

<sup>39</sup> Covad Comments at 2 & n.2.



#### IV. Section 272 Compliance

Late in the FCC's process of assessing its first two multistate applications, Qwest formally notified the Commission that it could not certify that the accounting records of its Section 272 affiliate Qwest Communications Corporation had been maintained in accord with Generally Accepted Accounting Principles ("GAAP"),<sup>40</sup> thereby raising questions as to its compliance with that provision of the 1996 Act.<sup>41</sup> The Department has opined that the safeguards of Section 272 are "necessary (though not sufficient)" to protect the interLATA market once Section 271 authority is granted in any particular state.<sup>42</sup> Although the Department has never conditioned a recommendation of approval on a finding of Section 272 compliance,<sup>43</sup> these regulatory safeguards have ramifications for protecting the integrity of the local market.<sup>44</sup> Therefore, the Department concurs with FCC Chairman Powell's statement that compliance with the statutory requirements is a necessary prerequisite for the grant of authority to provide interLATA service in any particular state.<sup>45</sup> The Department relies on the Commission to make the ultimate determination regarding Qwest's compliance with the regulations implementing Section 272 and supports the Commission's resolve to investigate this matter.

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<sup>40</sup> Qwest Applications Withdrawal *Ex Parte* at 1.

<sup>41</sup> FCC Chairman Powell Qwest Withdrawal Statement at 1.

<sup>42</sup> DOJ Michigan Evaluation at 27-29 (noting questions whether Ameritech's posting of affiliate transactions was sufficient to deter or detect discrimination, cross-subsidization or other anticompetitive behavior).

<sup>43</sup> See, e.g., DOJ Texas II *Ex Parte* at 1, 20 (recommending approval of SBC's application subject to the Commission's assuring itself as to the reliability of certain performance data, without addressing Section 272 concerns); *FCC Texas Order* ¶ 400 (noting questions regarding SBC's Section 272 affiliate's compliance with GAAP and their resolution by SBC's submission of additional evidence).

<sup>44</sup> See, e.g., *FCC Michigan Order* ¶ 345 ("Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive." (quoting *FCC Non-Accounting Safeguards Order*)).

<sup>45</sup> See FCC Chairman Powell Qwest Withdrawal Statement at 1.

## V. Conclusion

With respect to most of the issues about which the Department previously had expressed concern, Qwest's re-filed application demonstrates improvement. The Department reiterates its deference to the Commission's determination whether Qwest's pricing is appropriately cost-based and whether Qwest complies with Section 272. Moreover, the Department urges the Commission to evaluate carefully the allegations pertaining to Qwest's withholding of full information from regulators. Subject to the Commission's assuring itself that those and several other concerns raised in this Evaluation have been resolved, the Department recommends approval of Qwest's application.

Respectfully submitted,

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I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on October 22, 2002.

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